24 DEC 1975

MEMORANDUM FOR: Associate Deputy Director for Administration

SUBJECT : Secrecy and Protection of Intelligence Sources and Methods

REFERENCE : Request for comments on Subject from Associate DD/A, dated 19 December 1975

1. This memorandum is for information only.

2. Pursuant to your request, the Office of Security has reviewed the Office of General Counsel paper, "Secrecy and Protection of Intelligence Sources and Methods." We found it somewhat difficult to deal with the paper because a specific target was obscure at the outset. We concur with the author's conclusion that no changes in existing law should be recommended at least until completion of the various studies under way in the Executive Branch.

3. The author's conclusion that the substitution of a statutory classification system for Executive Order 11652 is not the primary vehicle for protecting information furnished to Congress concerns us somewhat. However, realizing that his conclusion is based partly on his sensitivity to the current political climate, we have no real basis for argument. It is difficult to be optimistic but we would like to think that Congress can be convinced that it is in the national interest to have an effective intelligence system, and that inherent in the need for intelligence is the need to preserve the ability to collect and produce it. If any disclosure causes or has the potential for causing the loss of an intelligence source or method, the intelligence may be lost or diminished in value. This could deny to the policy-makers information which they need to help preserve the nation's security. Therefore, intelligence sources and methods clearly are national security information as defined in Executive Order 11652.

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Orig - OD
1 - Subj [redacted] Chrono

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4. If and when it is decided to recommend new legislation, such legislation should include the concept that intelligence is a vital part of the nation's security and should: (a) provide authority to classify intelligence product, sources and methods; (b) provide elasticity for the retention of classification as long as necessary to protect sources and methods; (c) provide legal means for dealing with unauthorized disclosures; (d) be applicable to all, not just the Executive Branch; and (e) provide for appropriate review by Congress to prevent abuse.

5. It would appear that a major stumbling block in obtaining new legislation is the apparent special concern of Congress that secrecy might be used to cover abuses in the covert action area. For the sake of enhancing the possibility of obtaining adequate legislation for the protection of intelligence sources and methods, it is suggested that consideration be given to the concept of distinguishing between intelligence and covert action.

25X1

Acting Director of Security

~~CONFIDENTIAL~~

DDA Registry
File Appropriations + Budgets

DD/A 75-6108

23 December 1975

NOTE FOR : General Counsel

ATTENTION: [redacted] 25X1

SUBJECT : ICG Legal Studies

REFERENCE: Memo for Multiple Adses fr Acting GC dtd 18 Dec 75 (OGC 75-4720, DD/A 75-6051), same subject

With reference to OGC 75-4720 above, attached is a response from the Acting Director of Finance relating to the subject of classified intelligence budgets. For your information, I have given the Office of Security a 24 December deadline for response on the subject of secrecy and sources and methods [redacted] 25X1

[redacted]
Acting Executive Officer, DDA

Attachment:
DD/A 75-6094

Distribution:
Orig & 1 - Adse. w/cy of att
1 - DDA Subj w/orig att
1 - DDA Chrono w/cy of att
1 - RFZ Chrono w/o att
Acting EO-DDA [redacted] (23 Dec 75) 25X1

Att: Memo to ADD/A fr Acting D/Fin dtd 22 Dec 75, subject: Constitutional Issues Related to Classified Intelligence Budgets

[redacted] 25X1

~~CONFIDENTIAL~~

Approved For Release 2006/05/16 : CIA-RDP84-00780R006300030001-1

 75-6094

CONFIDENTIAL

22 DEC 1975

MEMORANDUM FOR: Associate Deputy Director for Administration

SUBJECT : Constitutional Issues Related to Classified Intelligence Budgets

Our comments re the document "CONSTITUIONAL ISSUES RELATED TO CLASSIFIED INTELLIGENCE BUDGETS" are as follows:

1. We defer to OGC for the legal defense of the constitutionality of the appropriation process as it relates to this Agency as well as to the accounting and budgetary treatment of receipts and expenditures.

2. It is our impression, however, that the document is overly defensive in its approach to the question. For example:

a. On Page 5 the constitutionality of expenditure reporting by agencies except CIA seems to be accepted on the premise such expenditures appear under titles that could reasonably be expected to include intelligence expenditures, whereas by implication it suggests reporting of expenditures of appropriations for CIA in Treasury statements may not be in accord with the constitution because the appropriation title does not have an intelligence connotation.

b. On Page 11 there seems to be an acceptance of the constitutionality of the $2 billion secretly expended on the Manhattan project, presumably because the totality was completed in a relatively short period of time but that the Agency situation is suspect because there is no precedent for hiding an entire budget over a long period of time.

c. On Pages 3 and 8 the paper implies something questionable about the practice of "transfers of funds" to CIA under the Economy

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25X1

SUBJECT: Constitutional Issues Related to Classified Intelligence Budgets

Act, suggesting the Agency is heavily dependent on such "transfers" for funding its expenditures. "Transfers of funds" under the Economy Act are in fact advances and are treated as such and are used for the purposes specified by the transferee agency. The Agency accounts back to the advancing agencies in detail for all expenditures of such advances and the advancing agencies are responsible for fully reporting the facts concerning such advances and expenditures thereof. Advances under the Economy Act are a common cost effective everyday method of doing business throughout the Federal establishment.

3. In our view, the Clause 7 provision of the constitution does not prescribe the specificity of the appropriation process to an extent that precludes the procedure observed for the Agency; nor does it prescribe the detail in which expenditures of public money shall be published. In this latter regard, the Agency is on record (Director of Finance affidavit in the recent [redacted] Freedom of Information Case) as affirming that all expenditures of appropriations for the Agency are reported and recorded in the records of the Treasury. 25X1

4. It is worthy of emphasis that the Director and the Congress are both on record as to the rationale for opposing revelation of even the total budget figure for the Intelligence Community. Thus none of the options discussed in Paragraph III of the paper appear to be viable.

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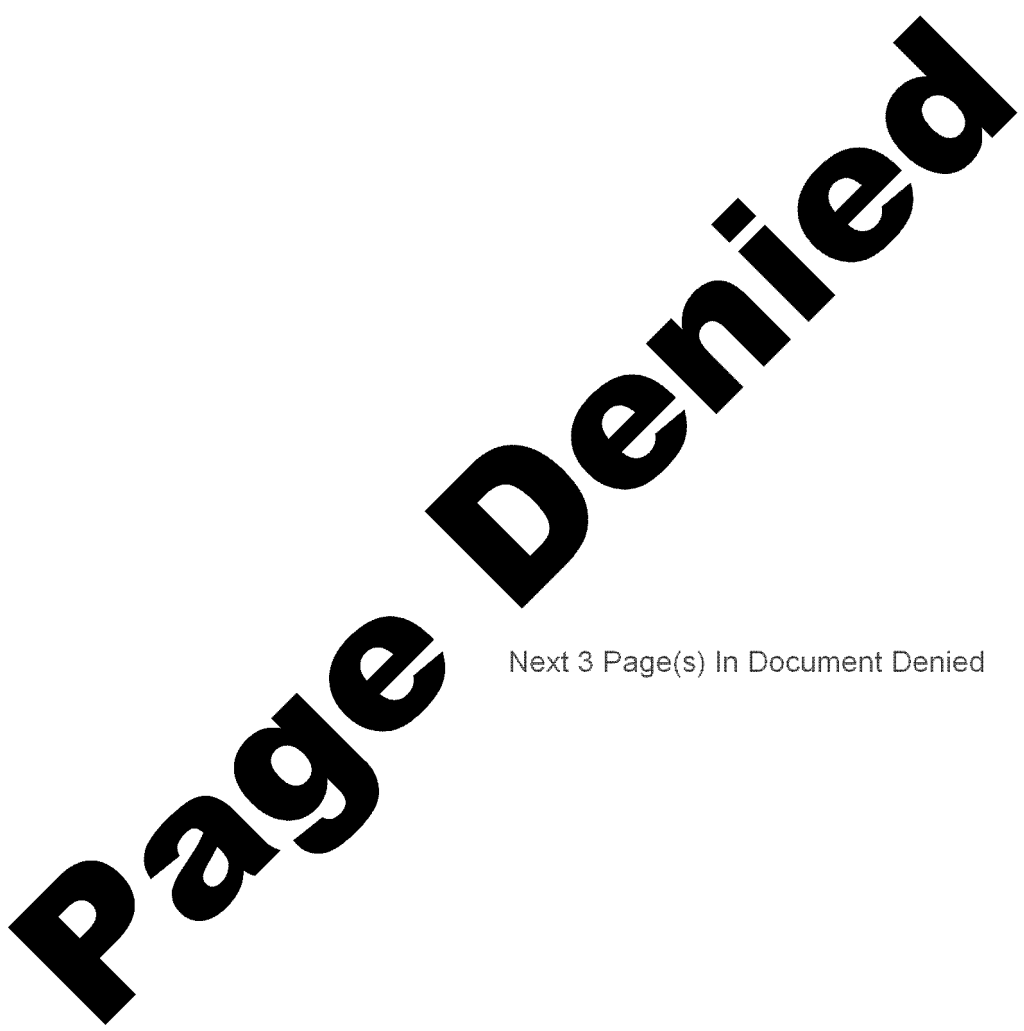
[redacted]
Acting Director of Finance



Next 3 Page(s) In Document Denied

OGC 75-4720
18 December 1975

MEMORANDUM FOR: Associate Deputy Director for Operations
Associate Deputy Director for Intelligence
Associate Deputy Director for Administration
Associate Deputy Director for Science and Technology
Legislative Counsel
Comptroller

SUBJECT : ICG Legal Studies

1. As you know the ICG has created a Second Study Group, which is a follow-on to the Ogilvie Group, to develop options for the President with respect to needed or desirable changes in the law concerning intelligence. The Study Group is chaired by Ron Carr of Justice and [redacted] is our member. At Tab A is a copy of the Study Group's charter. STAT

2. Individual members of the Study Group are preparing a series of background papers which the Group will then discuss and from which decision papers will be prepared by the Group to become a part of its final report. Its report is to be completed by 7 January to permit it to be available for consideration in the preparation of the President's State of the Union message. In addition and quite aside from the extent, if any, to which the Study Group's report is reflected in the State of the Union message, Mike Duval of the ICG Steering Group has advised that the purpose of the Ogilvie and Carr groups is to assist the President in his effort to get on top of the intelligence activities of the Government. It is not merely an effort to be ready to respond to congressional initiative for legislation in the intelligence area or to cut off Congress at the pass. The point is that the work of these two subcommittees is designed to assist the President in deciding what legal and other measures he will take or request to put his intelligence house in order.

3. At Tabs B and C are the first two papers prepared by Study Group members for consideration by that Group, which begins its consideration of papers at its meeting this afternoon. The paper "Constitutional Issues Related to Classified Intelligence Budgets" (Tab B) was prepared by Mason Cargill of the White House. The secrecy and sources and methods paper is by Lansdale. It has not been coordinated within the Agency but has been forwarded to the Second Study Group.

4. Please let me have your comments, concurrences or views, which need not be in writing, as soon as possible. Also, it is expected that additional papers will be circulated every day for the next week or two for which immediate consideration within the Agency will also be needed. Comments should be gotten to me or Lansdale in each case.

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[redacted]

Acting General Counsel

Attachments

Approved For Release 2006/05/16 : CIA-RDP84-00780R006300030001-1

STAT [redacted]

SECOND STUDY GROUP OF TH

ICG'S LEGISLATIVE GROUP

1 of 2

Steering Group: - Duval

- Wilderotter

- Waldmann

- Scalia

- Rogovin

Working Group: Ron Carr, Justice (Chairman)

STAT [redacted] CIA

Baldwin, State

Andrews, Defense

Mason Cargill, ICG

Matheny, NSC (?)

Donohue/Oliver, OMB (?)

I. Broad Areas of Interest

A) General Constitutional, legal and ethical issues involved in foreign intelligence operations.

- Separation of Powers
- Individual rights (e.g., privacy)
- Treaties and other forms of international law
- Domestic jurisdiction of CIA, DOD

B) Secrecy, protection of sources and methods, etc.

C) Domestic intelligence, which is not for foreign intelligence or prosecutorial reasons.

II. Preliminary List of Specific Tasks

1) Research papers (compilation of existing opinions, analysis of law, etc.)

- Separation of powers viz Congressional oversight.
- Legality of covert action
  e.g., consistency with treaty obligations and U.S. law.
- Individual rights (see Levi testimony and Rockefeller Report).
- Constitutional requirement for public intelligence budget.
- Applicability of Freedom of Information and Privacy Acts on foreign intelligence.

2) Legislative Issue Papers

- Statutory charters for: NSA, DIA, others(?)
- Domestic jurisdiction of: FBI, CIA, DOD
- Secrecy and protection of sources and methods

3) Catalog areas where legislative or administrative action may be needed (see draft attached - Tab A).

4) Develop decision papers.

Problem areas by function --

(1) Collection of intelligence information -- 4th amend., privacy problems -- What sorts of protections are needed to ensure that U.S. citizen's/resident's privacy is not unduly invaded by intelligence gathering techniques?

(A) abroad

(B) in U.S. -- warrants

(2) Dissemination and use of intelligence information -- What sorts of protections are needed to ensure that information gathered, abroad and in U.S., is employed solely for legitimate governmental purposes, to prevent abuse for partisan or otherwise illegitimate reasons?

(3) Covert operations -- What sorts of protections are needed to ensure that covert operations are both necessary to legitimate governmental interests and ethically responsible?

(A) with respect to foreign governments, organizations, activities;

(B) in U.S.

Problem areas of organization --

(1) Division of function, for foreign intelligence gathering and operations, between Defense/CIA and FBI.

(2) Division of function between foreign intelligence gathering/counterintelligence and domestic law enforcement -- is it possible or wise?

Problems of protection/accountability --

(1) What sanctions or other devices are necessary to ensure that confidential materials will not be disclosed by individuals -- officials or others -- without authorization?

(2) What sorts of changes in responsibility for and structure of classification system to identify materials that must remain confidential, and only those? Who should formulate/apply standards?

(3) To what extent and to whom can intelligence budgets be disclosed without endangering functions?

(4) What form and degree of Congressional oversight and review is both consistent with Congress' constitutional responsibility and the integrity of the Executive, and, at the same time, not injurious vital intelligence functions?

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

Dec. 17

Please send one copy each of the attached to the following:

Gordon Baldwin
Room 6419
Department of State
632-2630

Robert Andrews
Room 3E969
Pentagon
695-6804

STAT

Room 7D01, CIA (Langley)

STAT

Then return the original to Mason Cargill, Room 109, OEOB, Ex. 2352 (or call and I'll pick it up.

Thanks,

FROM: MASON CARGILL
WHITE HOUSE

Approved For Release 2006/05/16 : CIA-RDP84-00780R006300030001-1

C

17 December 1975

Secrecy and Protection of Intelligence Sources and Methods

I. General

1. The concept of protection of intelligence sources and methods is not identical with that of secrecy of intelligence activities. Secrecy is required with respect to intelligence itself. Often it is difficult to distinguish between intelligence and sources and methods, or to separate the two. Further, in many cases the time comes when the intelligence product no longer requires the protection of secrecy because of its content, but does need to remain secret because its disclosure might also disclose sources or methods for which there is a continuing need for secrecy. This paper addresses both secrecy in the intelligence area generally and the narrower area of protection from disclosure of intelligence sources and methods information.

2. It should be emphasized that the basic legal problem is an affirmative one--to make certain that necessary secrecy can be maintained. It is only because the former must be accomplished that the secondary need--to guard against and prevent undue secrecy and to make certain that necessary secrecy not be a vehicle for non-disclosure of any wrongdoing--comes into play.

II. Undue Secrecy

3. To address first the latter problem, that of undue secrecy, that issue essentially is one of improved and effective oversight and management, subjects to be covered in other papers. Rockefeller and Murphy commissions'

recommendations in this area are now in various stages of review and implementation. To a degree, any undue secrecy also can be a matter of improper implementation of Executive Order 11652. An interagency study of the workings of that order, together with other aspects of the management of classified information, has been instituted and appropriate recommendations may be expected from that source.

III. Providing Necessary Secrecy

4. The secrecy practices and mechanisms of the intelligence agencies are built on law deriving from all three branches of Government. From executive branch authority, Executive Order 11652 is certainly the basic working tool. Statutory authorities are provided by the National Security Act of 1947 (Tab A) (and implemented by NSC, DCI and departmental directives and regulations) and the CIA Act of 1949 (Tab B), both applicable as to CIA, and the former having some application also to sources and methods activities of the intelligence agencies generally. For the National Security Agency, Public Law 86-36 (Tab C) provides authority for secrecy of activities. Exemptions from certain provisions of the Code, mostly title 5 provisions, permit CIA and NSA to refrain from certain disclosures. Judicial decisions have long recognized and upheld the authority of the President in foreign relations and defense and intelligence areas. In Totten v. U.S. (92 U.S. 105 (1876)), for example, the court upheld the principle of non-disclosure of sources. "If upon contracts of such a nature an action against the government could be

maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of the dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way would be impossible; and, as such services are sometimes indispensable to the Government, its agencies in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." The Marchetti case, in 1972, is a landmark decision enforcing secrecy agreements not to disclose classified information.

5. In practice, there would seem to be several major areas of difficulty in maintaining secrecy, specifically, problems under the Freedom of Information Act, classification and declassification problems under the Executive order, problems arising from the disclosure of classified information to Congress, the absence of criminal law for the protection of sources and methods information, and the absence of statutory injunctive protection. As suggested at an earlier meeting of the Second Study Group, this is not the occasion to address the matter of revising the Freedom of Information Act and, as indicated earlier, any modification of the Executive order should await the current study of Executive Order 11652.

6. Secrecy As to Information Furnished Congress. Physical protection, access restrictions, secrecy agreements--these normal administrative measures by which agencies protect classified information under Executive Order 11652--generally can be applied when classified information is furnished to Congress. The major danger peculiar to the congressional situation arises when there is an intent of public disclosure by Congress without executive branch agreement, as in the recent Pike Committee incident. The agreement reached with the Pike Committee--i.e., agency/committee disagreement, Presidential certification and committee resort to the courts--seems the logical and workable action in this area.

7. Alternatively substitution of a statutory classification system for the Executive order classification system could avoid at least some of the problems of executive-congressional disagreement since the statute could be made applicable to all, not merely the executive branch. But there are several problems with this approach. One is that the statute might be written so as not to apply to congressional members and staffs. Additionally, any new statutory system might be considered insufficient from the executive's point of view. Also, there would be constitutional implications concerning the authority of Congress to restrict the President's authority in foreign affairs and defense.

8. Criminal Law Protection for Sources and Methods. For some time, the Director and the intelligence community have been concerned with the

absence of criminal law penalizing the disclosure of sources and methods information by past and present Government employees, employees of contractors and others furnished such information by virtue of their relationship with the Government. CIA and the Department of Justice have been negotiating the development of an appropriate bill and it seems probable that an agreed bill will be ready for submission to OMB early in the year. The essential problem with existing criminal law is that it is limited in scope (information concerning military installations and facilities, for example) or requires an intent to injure the United States or aid a foreign power, and, as such, does not reach the case of the former employee who simply elects to publish. This is particularly true when the information to be published is only an identification of intelligence sources, and even more so, if the source is no longer a productive one. Moreover, existing law is now in the process of change as S. 1 and related bills proceed on their tortuous course.

9. Protection by Injunction. The criminal legislation being developed also would empower the courts to enjoin the disclosure of classified sources and methods information again, however, applicable only to those who acquire information by virtue of their association with the Government. This approach is potentially the most valuable of all, since the possibility of an injunction against the author might deter publishers from committing resources to the preparation of a publication which might never become available, that is, the author might deter publishers from committing resources to the

preparation of a publication which might never become available, that is, the author might be enjoined from proceeding. Further, since the injunction would involve a civil, rather than criminal procedure, greater protection for the information during the course of the necessary litigation should be possible. And finally, injunction founded on statute would be on sounder footing than one resting on the existence of a secrecy agreement, as in the Marchetti decision.

IV. Conclusion

10. The foregoing suggests that no changes in existing law should be recommended at this time. Executive branch agreement on sources and methods legislation is being worked out elsewhere and will go forward when agreement is reached. Similarly any revision to Executive Order 11652 is for study elsewhere within the executive branch. In any event, it seems likely any changes in that order would involve essentially changes in detail or procedure. It suggests that the substitution of a statutory classification system for the Executive order is not the primary vehicle for protecting information furnished to Congress and would be undesirable for other reasons.